

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
2 CENTRAL PUGET SOUND REGION  
3 STATE OF WASHINGTON  
4

5 BLACK DIAMOND TREES, ROADS,  
6 ENVIRONMENT, ENGAGEMENT TEAM (BD  
7 TEAM),

8 Petitioner,  
9

10 v.

11 CITY OF BLACK DIAMOND,  
12

13 Respondent.  
14

Case No. 19-3-0013

FINAL DECISION AND ORDER

15  
16 **SYNOPSIS**

17 *Black Diamond Trees, Roads, Environment, Engagement Team (Petitioner)*  
18 *challenged the adoption of Ordinance No. 19-1121 by the City of Black Diamond (City) for*  
19 *failure to comply with various requirements for public participation in updates to the City's*  
20 *Comprehensive Plan. The Board found that the Petitioner had failed to prove any violation*  
21 *of RCW 36.70A.035 or RCW 36.70A.140 in the City's provision of opportunities to review*  
22 *and comment on the proposed changes, handling of and response to public comments, or*  
23 *in providing adequate notice and meaningful participation in the adoption of the challenged*  
24 *Ordinance.*  
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26  
27 **I. INTRODUCTION**

28 Petitioner challenged the City's adoption of its updated Comprehensive Plan, Ordinance  
29 No. 19-1121, alleging violation of the public participation requirements of RCW 36.70A.035  
30 and RCW 36.70A.140. The City adopted the plan on May 2, 2019, after a six year process  
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1 that included dozens of meeting and extensive comments and public process.<sup>1</sup> The central  
2 issue in this case is whether the City violated any provision of the GMA necessitating early,  
3 ongoing and adequate public participation in the adoption of a comprehensive plan or  
4 development regulations.

## 6 II. STANDARD OF REVIEW

7 Comprehensive plans and development regulations, and amendments to them, are  
8 presumed valid upon adoption.<sup>2</sup> This presumption creates a high threshold for challengers  
9 as the burden is on the Petitioner to demonstrate that any action taken by the City is not in  
10 compliance with the Growth Management Act (GMA).<sup>3</sup> The Board is charged with  
11 adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and  
12 development regulations.<sup>4</sup>

14 The Board's review is limited to the issues presented in the Petition for Review, and  
15 the Board is directed to find compliance unless it determines that the challenged action is  
16 clearly erroneous in view of the entire record before the Board and in light of the goals and  
17 requirements of the GMA.<sup>5</sup>

19 This Board gives *pro se* Petitioners every opportunity to make their case. The  
20 procedural record in this case shows that the presiding officer allowed supplementation of  
21 the record, denied the City's request for dismissal of one issue, and allowed informal  
22 argument and post-hearing clarifications by the Petitioner.<sup>6</sup> In rendering its decision,  
23 however, the Board is held to statutory and evidentiary standards based on the record  
24 before the City Council at the date of adoption of the challenged ordinance.  
25

27 <sup>1</sup> Ex. A to the City of Black Diamond's Prehearing Brief (October 21, 2019).

28 <sup>2</sup> RCW 36.70A.320(1).

29 <sup>3</sup> RCW 36.70A.320(2).

30 <sup>4</sup> RCW 36.70A.280, RCW 36.70A.302.

31 <sup>5</sup> RCW 36.70A.320(3). In order to find the City's action clearly erroneous, the Board must be "left with the firm  
and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201  
(1993).

32 <sup>6</sup> See Procedural History at Appendix A.

1 The Board has described the burden of proof, as it applies to *pro se* petitioners, on  
2 many occasions.

3 The Board has great respect for the considerable effort that *pro se* petitioners  
4 must expend in order to place issues that concern them before the Board.  
5 Nevertheless, the burden of proof that a petitioner must carry is the same  
6 regardless of whether the petitioner is an attorney or a non-attorney. As noted  
7 above, in order to overcome the presumption of validity, a petitioner must  
8 persuade the Board that the local government has acted erroneously, and to  
9 do so it must present clear, well-reasoned legal argument supported by  
appropriate reference to the relevant facts, statutory and case law provisions.  
Written or oral pleadings that lack these attributes will not suffice.<sup>7</sup>

10  
11 The burden of proof is on the Petitioner who must demonstrate that the action is not  
12 in compliance with the requirements of the Act.<sup>8</sup> It is not sufficient for the Petitioner to  
13 disagree with the action taken, nor to identify technical problems in the process leading up  
14 to adoption of the challenged ordinance. The direction to the Board is clear; the Board “shall  
15 find compliance unless it determines that the action taken by the City is clearly erroneous in  
16 view of the entire record before the Board and in light of the goals and requirements of the  
17 GMA.” Subsequent case law has been clear; the Board must be “left with a definite and firm  
18 conviction that a mistake has been committed” in finding a violation.<sup>9</sup>

19  
20 “Petitioner as the party with the burden of proof, cannot simply refer in general terms  
21 to a statute or regulation as having been violated. Rather, Petitioner must come forward with  
22 evidence and specific legal arguments relating to the statute or regulation in an attempt to  
23 satisfy Petitioner’s burden of proof.”<sup>10</sup>

24  
25 Procedural matters relevant to the case are detailed in Appendix A.

26 Legal issues relevant to the case are detailed in Appendix B.  
27  
28

29 <sup>7</sup> *Gagnier v. City of Bellevue*, CPSGMHB No.02-3-0014 (FDO, March 17, 2003) at 6.

30 <sup>8</sup> RCW 36.70A.320(2).

31 <sup>9</sup> *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993), *Quadrant Corp. v. Hearings Bd.*, 154 Wn.2d 224,  
237-238 (2005), *Anderson v. Pierce County*, 86 Wn. App. 290, 301 (1997).

32 <sup>10</sup> *Confederated Tribes and Bands of the Yakama Nation v. Yakima County*, GMHB No. 10-1-0011 (Final  
Decision and Order, April 4, 2011) at 26-27.

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### III. BOARD JURISDICTION

The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2). The Board finds the Petitioner has standing to appear before the Board pursuant to RCW 36.70A.280(2)(b). The Board also finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

### IV. APPLICABLE LAW

#### **RCW 36.70A.035(2)**

(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation, and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.

(b) An additional opportunity for public review and comment is not required under (a) of this subsection if:

...

(ii) The proposed change is within the scope of the alternatives available for public comment;

(iii) The proposed change only corrects typographical errors, corrects cross-references, makes address or name changes, or clarifies language of a proposed ordinance or resolution without changing its effect;

#### **RCW 36.70A.140 Comprehensive Plans – Ensure public participation.**

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting

1 legislation in response to the board's decision pursuant to RCW 36.70A.300  
2 declaring part or all of a comprehensive plan or development regulation  
3 invalid, the county or city shall provide for public participation that is  
4 appropriate and effective under the circumstances presented by the board's  
5 order. Errors in exact compliance with the established program and  
6 procedures shall not render the comprehensive land use plan or development  
7 regulations invalid if the spirit of the program and procedures is observed.

## 8 **V. ANALYSIS AND DISCUSSION**

### 9 **Issue 1**

10 Did the City of Black Diamond's adoption of its Comprehensive Plan fail to comply with  
11 RCW 36.70A.035(2)(a) and WAC 365-196-600(8)(c) and WAC 365-196-600(9)(a) because  
12 the City made changes to Ordinance No. 19-1121 after the close of public comment period  
13 and did not provide an opportunity for public review and comment on the changes prior to its  
14 adoption?

15 Petitioner asserts that there were numerous policy and text changes made to the  
16 Comprehensive Plan adopted on May 2, 2019, and the version advertised for the April 4,  
17 2019, public hearing, with no opportunity for public comment on the changes. The City had  
18 requested dismissal of this issue because any changes made were incidental and non-  
19 substantive.<sup>11</sup> The presiding officer denied that motion, awaiting briefing to show whether  
20 substantive changes were made.<sup>12</sup>

21 In its first sub-issue, Petitioner cites changes to the Comprehensive Plan suggested  
22 in a Puget Sound Regional Council (PSRC) comment letter as providing substantive  
23 differences between the two versions of the Comprehensive Plan, but offers only two rather  
24 minor edits made as a result of those comments as proof of substantive changes requiring  
25 an additional opportunity for public comment.<sup>13</sup> Petitioner's second issue is with the  
26 comment made by Ms. Kincaid at the May 2 meeting, that changes made from the Planning  
27 Commission recommendation to the Council draft had been discussed. Petitioner thereafter  
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31 <sup>11</sup> City's Motion for Partial Summary Judgment (August 23, 2019) at 4.

32 <sup>12</sup> Order on Motions (September 17, 2019) at 5, 6.

<sup>13</sup> Petitioner's Prehearing Brief (September 30, 2019) at 5.

1 lists multiple edits that were not discussed at the May 2 meeting.<sup>14</sup> Finally, Petitioner  
2 argues that some changes that the City described as accidental are not permitted under  
3 RCW 36.70A.035(2), because “it means .035(2)(a) allows changes if those changes are  
4 made by staff without telling the legislative body.”<sup>15</sup> In each case, Petitioner fails to identify  
5 any way in which these edits were substantial or of such significant impact as to require  
6 further opportunity for public comment or response. Nor does the Petitioner offer any legal  
7 precedent for requiring further public participation on these or analogous facts.  
8

9 And, as the City points out in response, RCW 36.70A.035(2)(b)(ii)-(iii) provides an  
10 exception to RCW 36.70A.035(2)(a), providing that an additional opportunity is not required,  
11 if “[t]he proposed change is within the scope of the alternatives available for public  
12 comment,” or if “[t]he proposed change only corrects typographical errors, corrects cross-  
13 references, makes address or name changes, or clarifies language of a proposed ordinance  
14 or resolution without changing its effect.” In its response, the City provided a table  
15 explaining and putting into context each and every one of the changes called out by the  
16 Petitioner.<sup>16</sup>  
17

18 The burden of proof is on the Petitioner to explain why the presumption of validity  
19 should be overcome in this case. Simply averring that someone *could* have commented on  
20 any of these changes, absent some proof of significance, simply acts to shift the burden of  
21 proof onto the City. The Board is unpersuaded, on these facts, that the City has violated  
22 RCW 36.70A.035.  
23

24 To the extent that this issue included reference to and statements that the City’s  
25 action violated certain WACs, the Board notes that Chapter 365-196 WAC is titled  
26 Procedural Criteria for Adopting Comprehensive Plans and Development Regulations. The  
27 applicability of these sections is set out in WAC 365-196-030(2):  
28

29 (2) Compliance with the procedural criteria is not a prerequisite for compliance  
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31 <sup>14</sup> Petitioner’s Prehearing Brief at 5-9.

<sup>15</sup> *Id.* at 10.

32 <sup>16</sup> City of Black diamond’s Prehearing Brief at 6, and *Ex. B*.

1 with the act. This chapter makes recommendations for meeting the  
2 requirements of the act, it does not set a minimum list of actions or criteria that  
3 a county or city must take. Counties and cities can achieve compliance with  
4 the goals and requirements of the act by adopting other approaches.

5 The Board must be persuaded that a requirement of the GMA itself, Chapter 36.70A  
6 RCW, has been violated. No such violation has been found here.

7 **The Board finds and concludes** that the Petitioner has failed to prove that adoption  
8 of Ordinance No. 19-1121 was in violation of the GMA because the City made changes to  
9 Ordinance No. 19-1121 after the close of public comment period and did not provide an  
10 opportunity for public review and comment on the changes prior to adoption. Issue 1 is  
11 dismissed.  
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13  
14 **Issue 2:**

15 Did the City of Black Diamond's adoption of its Comprehensive Plan fail to comply with the  
16 requirements of RCW 36.70A.140 and WAC 365-196-600(1)(b) and WAC 365-196-  
17 600(8)(a) and Black Diamond Municipal Code Ordinance 14-1044 and its Exhibit A "Public  
18 Participation Program" because the city did not provide a record or summary of public  
19 comments, did not provide response or explanation for action taken based on comments,  
20 did not allow adequate time to address comments, and did not meaningfully consider and  
21 respond to all public comments?

22 As noted above, where a jurisdiction's public participation actions are challenged,  
23 RCW 36.70A.140 itself provides that "[e]rrors in exact compliance with the established  
24 program and procedures shall not render the comprehensive land use plan or development  
25 regulations invalid if the spirit of the program and procedures is observed." Cities are not  
26 required to "necessarily act upon the desires expressed by the public during that  
27 participation and comment."<sup>17</sup> Likewise, there is no GMA requirement that the jurisdiction  
28 "must have prepared a document for public inspection specifically proposing all elements of  
29 the amendments ultimately adopted ...."<sup>18</sup>

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31 <sup>17</sup> *Burien v. Growth Mgmt. Hearings Bd.*, 113 Wn. App. 375, 388 (2002).

32 <sup>18</sup> *Burrow, et al. v. Kitsap County*, CPSGMHB No. 99-3-0018 (Final Decision and Order, March 20, 2000) at 9, 10.

1 Petitioner asserts that failure to provide a written summary of comments and a written  
2 response or explanation of the action taken on behalf of the comments, as described in  
3 WAC 365-196-600(8)(a), or findings of fact as required by Black Diamond's Ordinance 14-  
4 1044, constitute violations of the GMA.<sup>19</sup> Separately, Petitioner calls out the comment sent  
5 to the City by The Palmer Coking Coal Corporation as provoking changes that were  
6 documented as an action in response to a public comment. Petitioner notes that "[a]ll 5  
7 changes received an update in the Future Land Use Map (FLUM) that was advertised for  
8 public hearing on August 14, 2018, (TAB 63 PAGE 0696) and was later sent to Council for  
9 adoption May 2, 2019, (TAB 129 PAGE 1979)."<sup>20</sup>

11 Here, Petitioner acknowledges prior public notice of the changes to the FLUM in the  
12 August 14, 2018, FLUM but the complaint here is that changes made to the FLUM were not  
13 documented as a response to a public comment. Petitioner argues that the FLUM changes  
14 also violate WAC 365-196-600(1)(b), requiring that public participation procedures provide  
15 for broad dissemination of proposals and alternatives," and further, that the City did not  
16 provide adequate time between public hearings and final adoption, and did not meaningfully  
17 consider and respond to comments, as required by RCW 36.70A.140 and WAC 365-196-  
18 600(8)(a).<sup>21</sup>

20 As discussed above, Chapter 365 WAC is titled Procedural Criteria for Adopting  
21 Comprehensive Plans and Development Regulations, with limited applicability.<sup>22</sup>

23 The Board is to consider the procedural criteria contain in this chapter, but it is  
24 charged with determining compliance based on the act itself.<sup>23</sup> But even if the actions  
25 described by Petitioner were not within the exception provided by RCW 36.70A.140, WAC  
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28 <sup>19</sup> Petitioner's Prehearing Brief at 11-12.

29 <sup>20</sup> Petitioner's Prehearing Brief at 13, referencing Tab 157, pages 2424-2428.

30 <sup>21</sup> Petitioner's Prehearing Brief at 15-16.

31 <sup>22</sup> WAC 365-196-030(2) Compliance with the procedural criteria is not a prerequisite for compliance with the  
32 act. This chapter makes recommendations for meeting the requirements of the act, it does not set a minimum  
list of actions or criteria that a county or city must take. Counties and cities can achieve compliance with the  
goals and requirements of the act by adopting other approaches.

<sup>23</sup> WAC 365-196-030(3).



1 365-196-600(8)(a) is an aspirational directive to jurisdictions, using the word “should,” not a  
2 mandatory word such a “must” or “shall.”<sup>24</sup> The record includes references to some  
3 summaries provided over the course of development of the challenged Ordinance.<sup>25</sup> The  
4 City’s own public participation plan uses the word “should” in encouraging inclusion of  
5 comments or testimony in the written decision.<sup>26</sup>

6  
7 Petitioner’s argument focuses on a variety of things the City did not do, asserting a  
8 violation of RCW 36.70A.140 sufficient to find a violation and require remand to the City.  
9 However, the Petitioner has not shown that any of these actions are required by the statute.  
10 As previously discussed, recommendations made in the procedural and technical  
11 regulations do not constitute requirements of the GMA.

12 Changes to the land use map (referred to as the FLUM in Petitioner’s briefing) are  
13 dealt with again in Issue 3, below, but the Board notes that the Petitioner admits that all  
14 changes to the land use map which were the subject of The Palmer Coking Coal  
15 Corporation letter were identified in the August 14, 2018, materials but were not adopted  
16 until eight months later. While loosely alleging that the public notice was insufficient,  
17 Petitioner provides no evidence that the public was somehow misled or deceived by  
18 significant changes to the land use map (FLUM) made after opportunities for public  
19 comment ended.  
20

21 **The Board finds and concludes** that the Petitioner has failed to prove that adoption  
22 of Ordinance No. 19-1121 was in violation of the RCW 36.70A.140 because the City did not  
23 provide response or explanation for action taken based on comments, allow adequate time  
24 to address comments, nor meaningfully consider public comments. Issue 2 is dismissed.  
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28 <sup>24</sup> “The county or city should provide a written summary of all public comments with a specific response and  
29 explanation for any subsequent action taken based on the public comments. This written summary should be  
30 included in the record of adoption for the plan.” WAC 365-196-600(8)(a).

31 <sup>25</sup> City of Black Diamond’s Prehearing Brief at 8.

32 <sup>26</sup> “Relevant comments or testimony should be addressed through the findings-of-fact portion of the decision  
maker’s written decision or recommendation.” City of Black Diamond Public Participation Plan, *Ex. 142* at  
2080.

**Issue 3:**

Did the adoption process, especially the Planning Commission review, for the Comprehensive Plan violate GMA adequate notice and meaningful, early, and continuous participation requirements set out in RCW 36.70A.035, RCW 36.70A.035(2)(a), RCW 36.70A.140, WAC 365-196-600(1)(b), WAC 365-196-600(8)(c), WAC 365-196-600(9) and/or the City's adopted "Public Participation Program" and Ordinance 14-1044?

Petitioner asserts the City did not provide sufficient information about changes in the land use map nor provide sufficient opportunity for public participation, in violation of RCW 36.70A.035(1) and RCW 36.70A.140.<sup>27</sup>

Petitioner's argument centers on a belief that the City did not follow proper procedures in documenting the changes proposed in August 2018, and includes detailed descriptions of planning commission meetings. Petitioner's complaint is that the land use map (FLUM) "of August 2018 was not among the alternatives previously considered."<sup>28</sup> Petitioner's argument is that somehow the explanation for the August 2018 version was insufficient, and that constitutes a violation of the GMA.<sup>29</sup>

The Board notes that in its briefing, Petitioner concedes that the FLUM "hasn't changed since the August 2018 public hearing,"<sup>30</sup> a statement that is hard to reconcile with an allegation that the public was not afforded an opportunity to comment on it.

Petitioner also alleges that any notice provided was not effective, as required by RCW 36.70A.140, along with arguments that the procedures do not meet WAC 365-196-600(1).

The RCW and the WAC describe various methods of public notice and dissemination,<sup>31</sup> and as has been noted above, the WAC provides only procedural guidance and does not constitute a requirement of the GMA. Public notice and dissemination encompasses a variety of techniques; the City provided numerous exhibits demonstrating its

<sup>27</sup> As has been noted in Issues 1 and 2, the assertions concerning violation of procedural WACs is considered by the Board, but assertions of violation.

<sup>28</sup> Petitioner's Prehearing Brief at 17-21.

<sup>29</sup> *Id.* at 17.

<sup>30</sup> Petitioners Prehearing Brief at 17.

<sup>31</sup> RCW 36.70A.035, WAC 365-196-600(6).

1 compliance.<sup>32</sup>

2       Petitioner also claims that the changes to the land use map presented at the August  
3 14, 2018, public meeting were not the changes acted upon by the Planning Commission.<sup>33</sup>  
4 The City counters by noting that “the Petitioner offers no evidentiary support for this claim.  
5 Petitioner does not specify when the Planning Commission purportedly agreed to different  
6 changes, nor does Petitioner demonstrate that the Commission didn’t understand the  
7 changes to the land use map it ultimately recommended to the Council.”<sup>34</sup>

8  
9       In the briefing for Issue 1, Petitioner acknowledges that five changes to the land  
10 use map were advertised for the public hearing of August 2018, and in fact the  
11 Planning Commission did discuss some of these changes.<sup>35</sup> The record also shows public  
12 notices preceded this hearing and many subsequent meetings and hearings at which the  
13 updated Comprehensive Plan, including the land use FLUM, was available for public  
14 comment.”<sup>36</sup>

15  
16       The Land Use section of the Comprehensive Plan contains various descriptions of  
17 the Land Use changes reflected in the FLUM. These include:

- 18       • An explanation to the overlay zone.<sup>37</sup>
- 19       • Transfer of Development Rights TDR’s receiving area overlay.<sup>38</sup>
- 20       • The Gateway Corridor Overlay zone is described.<sup>39</sup>
- 21       • Potential Annexation Areas (PAA) referenced in connection with the FLUM (as  
22 UGA/FLUM).<sup>40</sup>

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26       <sup>32</sup> City of Black Diamond’s Prehearing Brief at 19-23 provides a table of public participation and public noticing  
27 concerning the Comprehensive Plan update, and includes *Exs. 3, 21, 24, 26, 28, 36, 38, 40, 42, 44, 48, 62,*

28       <sup>33</sup> *Id.* at 13, also at 17 - 21.

29       <sup>34</sup> City’s Prehearing Brief at 12.

30       <sup>35</sup> *Id.*

31       <sup>36</sup> *Ex. 62* at 631-632; *Ex. 65* at 881-882; *Ex 120*; *Ex. 121*; *Ex 126*. See also *Ex A*.

32       <sup>37</sup> *Ex. 129*, Comprehensive Plan Section 5.7.

<sup>38</sup> *Id.* Section 5.8.

<sup>39</sup> *Id.* Section 5.9.

<sup>40</sup> *Id.* Section 5.10.

1 Logically, the City describes anticipated land uses in the Land Use section and  
2 makes reference to the FLUM. The Petitioner seems to be arguing that the violation occurs  
3 when the City fails to put an explanatory note next to the map, ignoring the narrative  
4 explanation in the Land Use chapter.

5 In Issue 3, Petitioner again argues for a violation of a procedural WAC concerning a  
6 failure to document consideration of and response to public comments,<sup>41</sup> but the legal  
7 argument is insufficient for reasons previously outlined. The Board is advised to consider  
8 procedural WACs, but must base its finding of violation on the goals and requirements of  
9 the GMA itself.<sup>42</sup>

11 The Petitioner's brief focuses in multiple sections on a demand for exact adherence  
12 to both their particular interpretation of what the statute requires and to the City's public  
13 participation program. The Board would note, again, that RCW 36.70A.140 provides that  
14 "[e]rrors in exact compliance with the established program and procedures *shall not render*  
15 *the comprehensive land use plan or development regulations invalid if the spirit of the*  
16 *program and procedures is observed.*" [Emphasis added.]

18 It is clear that the Petitioner is unhappy with the substance of some portions of the  
19 Comprehensive Plan update and the included FLUM. However, Petitioner's challenge is to  
20 the public participation provided in support of the update. The record clearly illustrates a  
21 lengthy public process for this Comprehensive Plan update, spanning six years and multiple  
22 meetings, with many opportunities for comment.<sup>43</sup> And in all of the briefing provided,  
23 Petitioner has been unable to show any set of facts that would persuade this Board that the  
24 public was not afforded an opportunity to participate or comment meaningfully on significant  
25 Comprehensive Plan changes.

27 Petitioner includes in its briefing transcripts of meetings that demonstrate that the  
28 spirit of the public participation program was met, although Petitioner offers it for exactly the  
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31 <sup>41</sup> Petitioner's Prehearing Brief at 23.

32 <sup>42</sup> WAC 365-196-030(3).

<sup>43</sup> Ex. A, also Ex. B, Table Showing Comp Plan Changes, with Petitioner's Argument and City's Response.

1 opposite message.

2  
3 00:48:40 Commissioner Olson: I just wanted to put my comment into context. I  
4 was more referring to that it's been stated a couple times we were talking  
5 about somebody has reached out to that person and they're okay with it. And  
6 so I'm just if we're reaching out to some people and checking their, you know,  
7 what are their, what's their temperature we you know should do it to everyone.

8 CDD Kincaid: Oh, yes, and these were people though I should add that had  
9 already submitted a comment letters.

10 Olson: But I agree with Commissioner Seth also.

11  
12 CDD Kincaid: So that wasn't just a random, you know. And hopefully you know  
13 people will be paying attention and, and those property owners that want to  
14 come in and talk about their property and what they think if they think that we  
15 should reconsider the designation that's being proposed, let's hope that. *You*  
16 *know that's why we're trying to have a very public process so that that*  
17 *opportunity is afforded to everyone.*<sup>44</sup> [Emphasis added.]

18 **The Board finds and concludes** that the Petitioner has failed to prove that adoption  
19 of Ordinance No. 19-1121 was in violation of the RCW 36.70A.140 or RCW 36.70A.035  
20 because the adoption process did not provide for adequate notice and meaningful public  
21 participation.

## 22 23 VI. ORDER

24 Based upon review of the Petition for Review, the briefs and exhibits submitted by the  
25 parties, the GMA, prior Board orders and case law, having considered the arguments of the  
26 parties, and having deliberated on the matter, the Board finds:

- 27  
28 • The Petitioner has failed to prove that the adoption of Ordinance No. 19-1121  
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32 <sup>44</sup> Petitioner's Prehearing Brief at 23, citing July 10, 2018, Planning Commission meeting.

1 violated any provision of the Growth Management Act.

- 2 • This case is dismissed.

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4 SO ORDERED this 6<sup>th</sup> day of January 2020.<sup>45</sup>

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Deb Eddy, Board Member

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Bill Hinkle, Board Member

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13 **Note: This is a final decision and order of the Growth Management Hearings Board**  
14 **issued pursuant to RCW 36.70A.300. Should you choose to do so, a motion for**  
15 **reconsideration must be filed with the Board and served on all parties within ten days**  
16 **of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved**  
17 **by a final decision of the Board may appeal the decision to Superior Court within**  
18 **thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and**  
19 **WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and**  
20 **rules. The staff of the Growth Management Hearings Board is not authorized to**  
21 **provide legal advice.**  
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32 <sup>45</sup> The presiding officer in this case, Cheryl Pflug, was unavailable to participate in the final order.

## Appendix A: Procedural matters

On July 10, 2019, Black Diamond Trees, Roads, Environment, Engagement Team (Petitioner) filed a petition for review. The petition was assigned case no. 19-3-0013.

A prehearing conference was held telephonically on August 2, 2019. Petitioner appeared through its spokesperson, Kristen Bryant. Respondent City of Black Diamond appeared through its attorney, David Linehan.

A Prehearing Order was issued August 5, 2019. On August 23, 2019, City of Black Diamond filed a Motion for Partial Summary Judgment. The motion was denied in an Order on Motions filed September 17, 2019. On August 23, 2019, Petitioner filed a motion to supplement and a motion to use volunteers to transcribe audio recordings. These motions were granted. On November 4, 2019, Petitioner filed a motion to supplement the record. The motion was partially granted. On November 7, 2019, the City filed a Motion to Strike and Response to Petitioner's Motion to Supplement. The motion was denied.

The Briefs and exhibits of the parties were timely filed and are referenced in this order as follows:

- Petitioner's Prehearing Brief filed September 30, 2019.
- City of Black Diamond's Prehearing Brief filed October 21, 2019.
- Petitioner's Reply Brief filed November 4, 2019.
- City's Supplemental Brief filed November 21, 2019.
- Petitioner's Clarification in Response to City's Brief filed November 22, 2019.

### Hearing on the Merits

The hearing on the merits convened November 8, 2019. The hearing afforded each party the opportunity to emphasize the most important facts and arguments relevant to its case. Board members asked questions seeking to thoroughly understand the history of the proceedings, the important facts in the case, and the legal arguments of the parties.

## Appendix B: Legal Issues

Per the Prehearing Order, legal issues in this case were as follows:

1. Did the City of Black Diamond's adoption of its Comprehensive Plan fail to comply with RCW 36.70A.035(2)(a) and WAC 365-196-600(8)(c) and WAC 365-196-600(9)(a) because the City made changes to Ordinance No. 19-1121 after the close of public comment period and did not provide an opportunity for public review and comment on the changes prior to its adoption?
2. Did the City of Black Diamond's adoption of its Comprehensive Plan fail to comply with the requirements of RCW 36.70A.140 and WAC 365-196-600(1)(b) and WAC 365-196-600(8)(a) and Black Diamond Municipal Code Ordinance 14-1044 and its Exhibit A "Public Participation Program" because the city did not provide a record or summary of public comments, did not provide response or explanation for action taken based on comments, did not allow adequate time to address comments, and did not meaningfully consider and respond to all public comments?
3. Did the adoption process, especially the Planning Commission review, for the Comprehensive Plan violate GMA adequate notice and meaningful, early, and continuous participation requirements set out in RCW 36.70A.035, RCW 36.70A.035(2)(a), RCW 36.70A.140, WAC 365-196-600(1)(b), WAC 365-196-600(8)(c), WAC 365-196-600(9) and/or the City's adopted "Public Participation Program" and Ordinance 14-1044?